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**October Term, 1979**

**No. 79-54**

CITY OF LOS ANGELES,
*Petitioner,*

vs.

FANCHON BLAKE, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## AMICUS CURIAE BRIEF OF CITY OF EAST CLEVELAND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### INTEREST OF AMICUS CURIAE

The City of East Cleveland 5′ 8″ height required by ordinance for entry level police officers was held non-violative of the 14th Amendment to the U. S. Constitution, notwithstanding violative allegations and arguments at every level respecting the "due process" and "equal protection" clauses in *Smith v. Troyan*, (6th Cir., 1975) 520 F.2d 492, *pet. for reh. en banc denied* August 21, 1975, *cert. denied* June 14, 1976, 49 L. Ed. 2d 380, *pet. for reh. on*

*cert. denied* November 1, 1976. The within appellate court decision holds that an act of Congress invalidates a similar requirement of the City of Los Angeles and is "appropriate legislation to enforce" the 14th Amendment.

## OPINIONS BELOW

See Petition for Writ of Certiorari.

## JURISDICTION

See Petition for Writ of Certiorari.

## QUESTION PRESENTED

**Is it "appropriate" and constitutionally authorized legislation by Congress "to enforce" the 14th Amendment to enact a law in 1972, effective immediately, that creates a general presumption of unconstitutionality respecting existing and long standing municipal standards and tests considered critical and necessary for the selection of police officers and upheld as constitutional and nonviolative of the 14th Amendment after review or denial of Certiorari by the U. S. Supreme Court in 1976, and placing the burden of overcoming such presumption of unconstitutionality upon the municipalities in terms whereby the municipalities are not permitted to utilize conventional evidence available to them, but are required to produce unavailable statistical data empirically proving that those who do not meet the critical selection standards could not perform the critical functions of a police officer in a safe and efficient manner in light of National League of Cities v. Usery, 426 U.S. 833 (1976)?**



## THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See Constitution of The United States, Amendment XIV; 42 U.S.C. 1983, Title VII Civil Rights Act of 1964 as amended in 1972 (42 U.S.C. 2000e et seq.), and Petition for Writ of Certiorari.

## STATEMENT OF FACTS

See Petition for Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

A fair reading of the 9th Circuit Court decision indicates that the important stated constitutional question was properly raised in the lower court. The case relates to essential State and Municipal decisions regarding the conduct of integral governmental functions, to wit: selection and provision of police officers having the authority and responsibility to keep peace and physically arrest violators without first securing a warrant.

The Court of Appeals reversed the Trial Court, *Blake v. City of Los Angeles,* (U.S.D.C., C.D. Calif., 1972) 435 F. Supp. 55, finding that: (1) the evidence submitted under the vehicle of a summary judgment motion was insufficient to justify use of a gender classification, "policemen" and "policewomen," prior to the passage of Title VII (42 U.S.C. 2000e et seq.) amendments on March 24, 1972, and while the City was developing less restrictive physical standards and tests for selecting police officers; (2) finding the evidence insufficient to sustain the City's 5'6" height requirement and physical test battery adopted July 1, 1973; and (3) determining that the only evidence that can satisfy

Title VII are statistical correlations that can only be secured by making an experiment of public safety, utilizing an Industrial Psychologist, hiring people who are certain to fail in the judgment of professional experts for the City, and exposing the public to the risk and liability until the Industrial Psychologist has enough data, regardless of the time, the risk and liability exposure, the cost, and the availability of other evidence and professional opinions.

There are and have been many cases in the District Courts dealing with minimum height requirements for police officers. These cases have diverted at least $50,000 of municipal funds away from direct service utilization in each case and have otherwise drained away time and effort that was desperately needed to combat crime in the nation's communities. The City of East Cleveland (39,600 population in 3.2 square miles) had its height requirement held constitutional in *Smith v. Troyan,* (6th Cir., 1975) 520 F.2d 492, *pet. for reh. en banc denied* August 21, 1975, *cert. denied* June 14, 1976, 49 L. Ed. 2d 380, *pet. for reh. on cert. denied* November 1, 1976. Now the City is back in Court with *Malone, et al. v. East Cleveland,* (U.S.D.C., N.D. Ohio) Case No. C75-894 wherein the same claims are being asserted under Title VII that were asserted under 42 U.S.C. 1983. One other city, Shaker Heights, Ohio, which relied in part on the decision in the *Smith* case, *supra,* is now in court in *Hammond v. Shaker Heights, et al.,* (U.S.D.C., N.D. Ohio) Case No. C78-1303 under a similar attack on its 5'8" minimum requirement for police officers.

The impact on the nation's cities and the Supreme Court docket will be tremendous unless a case such as the within case is taken to clarify the constitutional and evidentiary issues at stake. Does every city in the nation have to go through multiple attacks and litigation on physical standards and tests deemed essential to provision of



police officers of sufficient strength and ability to arrest the average criminal?

The Appellate Court decision creates tremendous uncertainty for municipalities in two critical respects, to wit: (1) selection for the position of police officer, probably requiring the most certainty in decision, is impossibly clouded with uncertainty, and (2) attempts to comply with the 14th Amendment and not violate same by following the wisdom of Supreme Court decisions are seriously undermined and clouded with uncertainty, if Congress is given *carte blanche* authority to determine what is or isn't violative of the 14th Amendment notwithstanding such decisions. The decisions pertaining to local government and sovereignty have to be made on what is or is not constitutional and the interest and expertise of local officials as to what is constitutional and required by the circumstances and history should be given some weight in our system of Federalism.

Historically, the nation's cities or municipalities have *ab initio* maintained police officers including police officers having the authority *inter alia* when a crime has been committed, to arrest and detain using whatever force is reasonably necessary, to secure evidence, and to bring the accused before a court to answer to the charges. Unlike many Federal agents, e.g., F.B.I., police officers have the authority and are required more often than not to react spontaneously without the benefit of legal opinions, warrants, or amassing additional manpower. The selection and provision of police officers having sufficient strength, intellect, and developed ability to learn and discharge the tremendous variety of mental and physical duties within the discretion and demands of the office is among the most essential, fundamental, critical, and integral governmental functions that a City has. This power is coupled

with the duty to the citizens and taxpayers to use judgment in such decisions so as to minimize the risk of injury, violation of rights, etc. and the resultant workers' compensation claims and suits for damages, including the wide variety revealed in the annotations to 42 U.S.C. 1983. Decisions to this end have been sustained, e.g., that a police officer be required to pass a reading comprehension test was held constitutional in *Washington v. Davis* (1976), 426 U.S. 229 and the requirement that police be at least 5'8" to insure the strength or appearance of strength relative to actual or potential force encounters with the average arrestee who is on the average 5'9", 150-170 lbs., and under 30 years of age and male more often than not, was held valid and non-violative of the 14th Amendment in *Smith v. City of East Cleveland, aka, Smith v. Troyan, supra.*

From another historical perspective we find that until recently, i.e., 1971 (See *Reed v. Reed,* 404 U.S. 71 (1971)), that the U. S. Supreme Court rejected charges of sex discrimination, according to "CONSTITUTION OF THE UNITED STATES OF AMERICA", revised and annotated 1972 (compiled and published pursuant to Public Law 91-589, 84 Stat. 1585, 2 U.S.C. Section 168), in the tones quoted at page 1509.

The evolution of accepted customs and perspective in our nation regarding equality on the basis of sex is still in flux, e.g., proposed Amendment 27 (ERA) has been debated, but not ratified, since March 22, 1972. As a nation, we have evolved from a physically oriented, mixed agrarian-pioneer society to a highly industrialized society which utilizes labor saving machines that males and females can both effectively operate more often than not; this all occurring while old world segments of population, mostly European, together with their cultures, have been annexed by immigration.



The 9th Circuit decision is unfair, is lacking in historical perspective, fails to come to grips with the difference between "regulating" Commerce as Title VII was originally intended and "enforcing" the 14th Amendment (the basis upon which Title VII was extended to States and their political subdivisions on March 24, 1972, see *Fitzpatrick v. Bitzer* (1976), 427 U.S. 445) relative to the selection and provision of police officers, and is in conflict with the letter and spirit of Title VII (42 U.S.C. 2000e et seq.) and numerous high court decisions: *Smith v. Troyan, supra; Washington v. Davis, supra; Oregon v. Mitchell,* 400 U.S. 112 (1970); *National League of Cities v. Usery,* 426 U.S. 833 (1976); and *Dothard v. Rawlinson,* 433 U.S. 321 (1977). In *Washington v. Davis, supra,* "intent" in the use of a facially neutral selection test was held to be an essential element of establishing a constitutional violation; Title VII makes reference to "intent" as an enforcement prerequisite at 42 U.S.C. 2000e-2(h) and 42 U.S.C. 2000e-5(g). In *Smith v. Troyan, supra,* the court held that full weight may be given to critical functions that take only a small amount of time, i.e., police officers must be fully capable of physically arresting the average 5'9", 170 lbs. accused or solving a murder case, etc., regardless of how often those events occur. All rescue and protective work involves periods of standby routine, but requires dedicated individuals physically and mentally ready, willing and able to rise to the occasion whenever the need for their rescue services arises, no matter how often. See "lifeguard" example cited at 520 F.2d 496. In *Dothard v. Rawlinson, supra,* a height requirement for prison correctional counselor was held invalid for want of *any* evidence in support thereof, a gender classification was sustained on nonstatistical evidence, and three justices concurred that the evidentiary burden could be shouldered by offering evidence or making legal arguments not dependent on new evidence,

e.g., appearance of strength, which were not presented to the District Court (See 433 U.S. 321 *Id.* at 337-340).

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), a voting rights case, at page 128, the Court found that the Congressional enforcement power under Section 5 of the 14th Amendment is not unlimited and that there are at least three limitations, to wit: (1) Congress may not by legislation repeal other provisions of the Constitution; (2) The power granted was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole nation; and (3) Congress may only "enforce" the provisions of the amendment and may do so only by "appropriate legislation."

Both *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the narrow exception grafting decision relied upon by the lower court, and *Oregon v. Mitchell, supra*, referred to *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 2d 579, 605:

> "Let the end be legitimate, let it be within the scope of the Constitution, and *all means which are appropriate*, which are *adopted to that end* which are *not prohibited*, but consist with the *letter and spirit* of the Constitution, are constitutional." (emphasis added).

As stated in *National League of Cities v. Usery, supra*:

> "Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."



## CONCLUSION

The U. S. Supreme Court should grant certiorari in the within matter for the numerous compelling reasons stated. Even if the evidence for summary judgment is eventually found insufficient, retrial and trial of numerous other cases could be given proper constitutional perspective by the court's consideration and decision in this case.

Respectfully submitted,

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